

BOARD OF ALIEN LABOR CERTIFICATION APPEALS  
800 K St., N.W.  
WASHINGTON, D.C. 20001-8002

Date: 5/9/01  
Case Nos: 2000-INA-00002

In the Matter of:

DOS TAQUITOS, INC.  
Employer

On Behalf of:

ANGELA SALAMANCA  
Alien

Appearance: Arnulfo Chapa, Esq.  
for the Employer and the Alien

Certifying Officer: Floyd Goodman  
Atlanta, Georgia

Before: Holmes, Vittone and Wood  
Administrative Law Judges

JOHN C. HOLMES  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from an application for labor certification on behalf of alien, Angela Salamanca ("Alien") filed by Employer, Dos Taquitos, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Atlanta, Georgia denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis

must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

#### **STATEMENT OF THE CASE**

On January 12, 1998, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Cook/Latin American Style in its Restaurant.

The duties of the job offered were described as follows:

"To cook, prepare, and season soups, meats, vegetables, desserts, and other food stuffs in the Latin American style cuisine."

Two years experience in the job, or the related job of Cook's Helper were required. Wages were \$300.00 per week. The applicant supervises 0 employees and reports to the Owner. (AF-46-59)

On May 10, 1999, the CO issued a NOF denying certification. The CO citing Section 656.21(b)(5) found: "The employer is requiring two years experience in the job offered, Cook, Latin American Style or two years in the related occupation, Cook's Helper. The alien's work history on form ETA 750, part B, does not demonstrate that the alien has the required experience other than with the employer. Experience gained with the employer cannot be counted. Thus the employer has not documented the minimum acceptable requirements of the job. Corrective action would be to delete the requirement and readvertise or to document evidence that the requirements listed are the actual minimum requirements and that the alien meets these requirements. The employer must provide documentary evidence that the alien had the required two years of experience." (AF-32-33)

On May 28, 1999, Employer through its General Manager/Co-President stated: "I certify that Angela Salamanca has been working for Dos Taquitos Mexican restaurant since January 1994. Her many years of experience as a cook helper have assure her position as a cook helper in the restaurant. She is in charge of all food preparation including menu selection with emphasis on authentic Mexican Latin American cuisine. Her knowledge experience are a great asset to the restaurant. Angela is one of the reasons that Don Taquitos has maintained its reputation for five years. She is also a remarkable and authentic cook. She

administrates her kitchen in a professional manner..."  
(Uncorrected) (AF-24-29)

On August 14, 1999, the CO issued a Final Determination denying certification, stating: "The employer's rebuttal consisted of a letter from the employer verifying the alien's employment. The employer did not provide any documentary evidence that the alien received qualifying experience with any other employer nor did the employer provide any documentary evidence that the position "Cooks Helper" was substantially dissimilar than that of "Cook, Latin American Style" and therefore could be considered as qualifying experience..." (AF-22-23)

On September 14, 1999, the Employer filed a request for review of denial of labor certification. (AF-1-7)

### DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 1988-INA-313 (1989); Belha Corp., 1988-INA-24 (1989)(en banc).

We believe the CO was correct in denying certification since Employer has failed to document that alien had prior experience in Latin American Style cooking prior to employment with Employer in 1994, at which time alien was approximately 18 years of age. Alien's cooking experience was not documented as being other than with Employer and, therefore, the CO's finding was unrebuted. It is a long held principle that a job opportunity's requirements may be found not to be the actual minimum requirements where an alien did not possess the necessary experience prior to being hired by the Employer. Bear Stearns & Co. Inc., 1988-INA- 427 (July 29, 1989).

Since we find the CO's denial was proper on other grounds, we need not address the issue of "alternative qualifications". We do note, however, that this case would appear to be squarely addressed by the Board's decision in Francis Kellogg, 1994-INA-465; The Winner's Circle, 1994-INA-544; and North Central Organized for Total Health, 1995-INA-68, (en banc)(Feb. 2, 1998) wherein the Board held that: "Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of 'alternate' qualifications, is a violation of 656.21(b)(5)." Under Kellogg which overruled Best Luggage and its progeny, Employer's alternate job experience of "Cook's Helper" as qualifying experience for the position advertised of "Cook, Latin American Style" would appear to be not lawful under the facts of this case. Employer has demonstrated that alien is a valuable employee, and contended on appeal that no applicant responded to the advertisements for either position.

However, this is not a sufficient basis for granting of labor certification.

**ORDER**

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES  
Administrative Law Judge

